Rasid bin Kulop Mohamad v Timbalan Menteri Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–69 OF 2003
ABDUL KADIR MUSA J
17 SEPTEMBER 2004

Criminal Procedure — Habeas corpus — Proper procedure — Whether failure of officers properly addressing documents ordering detention to receiving parties vitiated detention order by Minister — Emergency (Public Order And Prevention of Crime) Ordinance 1969 s 3(3)(a) and (b)

The applicant applied to this court for a writ of *habeas corpus*. The detention was made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') by the Deputy Minister of Home Affairs for a period of two years. The issue to be decided in this case was whether or not the detentions under s 3(3)(a) and (b) of the Ordinance have complied with the essential requirements of those sections namely, the 'procedurally substantive' requirements that the officers exercising their powers under s 3(3)(a) or (b) of the Ordinance directed the appropriate prison officer(s) or police officer(s) or officer(s) of other similar places authorised by the Minister 'to receive and detain' the detained person. The documents exhibited to show the exercise of the valid power by the relevant officers did not speak of to whom the said documents were addressed to.

Held, allowing the application:

The failure of the officers exercising their power under s 3(3)(a) or (b) of the Ordinance to properly address the documents (directing the appropriate officers to receive and detain) to the receiving parties was a 'failure to comply with one of the procedurally substantive requirements'. Such a 'substantive' failure, made the detentions under s 3(3)(a) and (b) of the Ordinance unlawful. Consequential to that, it had the effect of vitiating the legality of proper exercise of power by the Minister under s 4(1) of the Ordinance (see para 22).

[**Bahasa Malaysia summary**

Pemohon memohon kepada mahkamah ini untuk writ habeas corpus. Tahanan dibuat di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mengecah Jenayah) 1969 ('Ordinan tersebut') oleh Timbalan Menteri Dalam Negeri untuk dua tahun. Isu yang perlu diputuskan dalam kes ini adalah sama ada tahanan di bawah s 3(3)(a) dan (b) Ordinan tersebut telah ikut keperluan penting seksyen tersebut iaitu keperluan prosedur substantif bahawa pegawai-pegawai yang menggunakan kuasanya di bawah s 3(3)(a) atau (b) Ordinan tersebut perlu mengarahkan pegawai penjara berkenaan atau pegawai polis berkenaan atau

pegawai dari tempat lain yang diluluskan oleh Menteri 'untuk menerima dan menahan' orang yang ditahan. Dokumen yang dieksibitkan untuk menunjukkan penggunaan kuasa yang sah oleh pegawai-pegawai berkenaan tidak menunjukkan kepada siapa ia dialamatkan.

Diputuskan, membenarkan permohonan:

Kegagalan pegawai-pegawai berkenaan untuk menggunakan kuasa di bawah s 3(3)(a) atau (b) Ordinan tersebut dengan tidak alamatkan dokumen-dokumen (mengarahkan pegawai-pegawai untuk menerima dan menahan) kepada pihak penerima adalah 'kegagalan untuk ikut salah satu keperluan prosedur substantif'. Kegagalan substantif sebegitu menjadikan tahanan di bawah s 3(3)(a) dan (b) Ordinan tersebut menyalahi undang-undang. Oleh kerana itu, ia mempunyai kesan mengganggu keesaan penggunaan kuasa oleh Menteri di bawah s 4(1) Ordinan tersebut (lihat perenggan 22).]

Notes

For cases on application for *habeas corpus* generally, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1727–1824.

For cases on proper procedure for *habeas corpus*, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1803–1818.

Legislation referred to

Emergency (Public Order And Prevention of Crime) Ordinance 1969 ss 3(3)(a), (b), 4(1), (5)

Federal Constitution Art 5(1)

Abd Shukor Ahmad (Baljit Singh Sidhu with him) (Shukor Baljit & Partners) for the applicant.

Fazillah Begum (Najib Zakaria with her) (Senior Federal Counsel) (Attorney General's Chambers) for the respondents.

Abdul Kadir Musa J:

[1] The applicant, Rasid bin Kulop Mohamad, represented by his counsel, En Shukor Ahmad and En Baljit Singh applied to this court for a writ of *habeas corpus* vide encl 3 supported by his affidavit as per encl 2. The respondent was represented by En Najib Zakaria. The detention was made under s 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') by the Deputy Minister of Home Affairs on 30 May 2002 for a period of two years effective from the same date. Detained under the same section is Murali a/l Munusamy in 44–48 of 2003 whereby counsels for the applicant and respondents were the same as in 44–69 of 2003. That being so, both parties agreed that, the decision in 44–69 of 2003 will also be equally applicable to 44–48 of 2003.

[2] Section 4(1) of the Ordinance provides as follows:

> (1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, …the Minister shall make an order …directing that person to be detained for any period not exceeding two years.

[3] In the present application before me, the question of '…the Minister (being) satisfied…' that the relevant detention order '…is necessary…' within the purport of the said s 4(1) is not the issue at the preliminary stage of the detention. What is more compelling for me to consider is whether or not the detentions under sub-ss 3(3)(a) and (b) of the Ordinance have complied with the essential requirements of those sections. I said so because the aforesaid detention order was, from the facts of the application before me, certainly made consequential to the detention under the said s 3(3)(a) and (b).

[4] For convenience, the said sub-s (3) of the Ordinance states:

> (3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under section 4(1) (of the Ordinance):
>
> Provided that:
>
> (a) he *shall not* be detained for more than twenty-four hours *except* with the authority of a police officer of or above the rank of an Inspector;
>
> (b) he *shall not be detained* for more than forty-eight hours *except* with the authority of a police officer of or above the rank of an Assistant Superintendent;
>
> (c) he *shall not* be detained for more than thirty days unless a police officer of or above the rank of a Deputy Superintendent *has reported* the circumstances of the arrest and detention to the Inspector-General of Police… and the Inspector-General…, *shall forthwith report the same to the Minister* (Emphasis addeed).

[5] If all the requirements of the said s 3(3) have been complied with, then the arrest and detention by the appropriate police officers concerned has to be lawful by virtue under s 3(5) of the Ordinance. Section 3(5) provides:

> (5) Any person detained under the powers conferred by this section shall be deemed to be *in* lawful custody, and may be detained *in* any prison, or *in* any police station, or *in* any other similar place authorised generally or specially by the Minister (Emphasis added).

[6] From the above, it is my firm conclusions that s 3(3)(a)–(c) of the Ordinance speak of:

(1) the 'procedural compliance' by the arresting and detaining authority and

(2) the 'constitutional right' of individual under art 5 of the Federal Constitution.

[7] It is only when (1) above is religiously complied with can an individual 'constitutional right' be deprived by virtue of art 5(1) of the Federal Constitution. The law that legalised such deprivation is s 3(5) of the Ordinance. Having established that, it is now incumbent on me to be satisfied beyond reasonable doubt that (1) above has been adhered to. Failure to do so, leaves me with no alternative, but to allow the Application without having to consider 'the satisfaction' of the Minister in issuing the relevant detention order under s 4(1) of the Ordinance. For that purpose, s 3(3) of the Ordinance requires further analysis.

[8] Dissection of the aforesaid s 3(3) irresistibly led me to two main conclusions which I would classify as:

(a) 'procedurally procedure'; and

(b) 'procedurally substantive'.

[9] In (a) above, it includes 'technicalities'. In that respect, I strongly hold that defect in complying with certain procedural requirement so long as it does not result to gross injustice to the person detained would not result in the detention under s 4(1) to be unlawful. As an example, if the form used has not yet been gazetted, the use of such a form, should not invalidate the order made by the Minister. Another example is a genuine typing error as to the 'date' or 'month' in which the relevant order is being relied upon. Such an error should not invalidate the detention order as being unlawful for want of procedural compliance so long as it can be supported by other documents to show otherwise. Since 'procedurally procedure' defects is non-exhaustive, it will be sufficient for me to cite those two examples, and to elaborate further on (b) above.

[10] Unlike (a) above, any non-compliance of 'procedurally substantive' procedures goes to the very core of infringement of the 'constitutional right' of individual entrenched in art 5 of the Federal Constitution. In that context, s 3(3) must be read together with s 3(5) of the Ordinance.

[11] Microscopic analysis of both the aforesaid sub-sections of s 3 of the Ordinance dictates me to search the legal significance of the word 'in' in both ss 3(3) and 3(5) of the Ordinance. In s 3(3), it speaks of '…detained in police custody…', whilst in s 3(5) it clearly states as '…deemed to be in lawful custody…' which can be done so '…in any prison, or in any police station, or in any other similar place authorised… by the Minister'. Thus the use of the word 'in' suggests, without doubt, that, the 'detained person' must be detained in any of the places specified by s 3(5) of the Ordinance. Such custody, by virtue of s 3(3), is 'in police custody' which s 3(5) deems it '…to be in lawful custody…'. Nowhere in both ss 3(3) and 3(5) speak of being 'in' the 'lawful custody' of any of the 'police officers' referred to in s 3(3)(a)–(c) of the Ordinance. The said s 3(3)(a)–(c) identifies 'which' of the police officers 'can do what' in order to make the arrest and detention lawful.

[12] 'Can do what', in my opinion, will certainly fall within the intention of 'procedurally substantive' matter(s) referred to me earlier. In the context of my above analysis, in order to satisfy the word 'in' found in s 3(5) discussed above it follows that, any of the officers exercising his power under s 3(3)(a) or (b) of the Ordinance must direct appropriate prison officer(s) or police officer(s) of any police station or officer(s) of other similar places authorised by the Minister 'to receive and detain' the detained person 'in any prison' or 'in any police station' or 'in any other similar place…' but certainly not to himself. To comply with the above requirement, there must be conclusive evidence that the officers exercising their powers under s 3(3)(a) and (b) aforesaid communicate to any officers of 'any prison' or 'any police station' or 'any other similar place (of lawful detention)' which can be extracted from all the relevant facts of the Application. Unfortunately I could not find any.

[13] Close scrutiny of those relevant facts, there is not a shred of evidence to suggest that there was any oral communication of the aforesaid nature from either chief Insp Abdul Rahman bin Hj Hamid or ASP Mansor bin Mohamad. Documentary evidence of the exercise of a valid power by the former is evidenced by exh 'ARAH 2' of encl 12 whilst that of ASP Mansor is exhibited by 'MMI' to encl 11. Both the said officers rightly exercised their powers under s 3(3)(a) and s 3(3)(b) of the Ordinance respectively.

[14] However close reading of both the said 'ARAH 2' and 'MMI' shows clearly that, neither the said documents speaks of 'to whom' both the said documents were *addressed to*. They merely speak of the respective officers exercising their respective power and explained why the detained person, Rasid bin Kulop Mohamad, needed to be detained further under s 3(3)(a) and later s 3(3)(b) of the Ordinance. It is my considered conclusion that both 'ARAH 2' and 'MMI' should be addressed to the 'detaining authority', otherwise such documents are not authorisation documents. I find support to my said conclusion in 'WAN-1' to encl 10 of Superintendent Wan Ahmad Najmuddin bin Mohd.

[15] In the said 'WAN-1' of encl 10, Superintendent Wan Ahmad was acting under s 3(3)(c) of the Ordinance whereby he is required to report 'the circumstances of the arrest and detention' of Rasid bin Kulop Mohamad 'to the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf…'. From 'WAN-1', it is clearly addressed to 'ACP Abdul Rahim bin Hj Hanafi, KPP D7, of Jabatan Siasatan Jenayah, PDRM, Bukit Aman, Kuala Lumpur. ACP Abdul Rahim bin Hj Hanafi, was the 'police officer designated by the Inspector-General of Police' to receive such report as stated in para 3 of encl 10 as supported by 'ARAH-1' to encl 9.

[16] Section 3(3)(c) placed the burden of reporting the aforesaid arrest and detention to the Minister on the aforesaid 'designated officer'. This was done by him as evidenced by 'ARAH-2' to the same enclosure. Again the said 'ARAH-2' is properly addressed to:

YB Menteri Dalam Negeri Kementerian Dalam Negeri….

[17] From the above, it is demonstrated that, what is required of 'procedural substantive' actions to be taken has been taken by appropriate officer(s) by addressing 'to':

(i) ASP Abdul Rahim bin Hj Nahafi aforesaid by Supt Wan Ahmad Najmuddin bin Mohd; and

(ii) YB Menteri Dalam Negeri, Kementerian Dalam Negeri, by the aforesaid ACP Abdul Rahim

under s 3(3)(c) of the Ordinance.

[18] Even the 'detention order' made by the Minister under s 4(1) of the Ordinance as per 'ZAZ-1' to encl 6 of the Deputy Minister of Home Affairs was addressed to as follows:

Kepada:

Penguasa

Pusat Pemulihan Akhlak,

Simpang Rengam,

Johor.

Ketua Polis Negara,

Bukit Aman,

50560 Kuala Lumpur.

Semua Pegawai Polis Diraja Malaysia yang berkenaan.

[19] The presence of the word 'Kepada' in 'ZAZ-1', 'to ACP Abdul Rahim bin Hj Hanafi' in 'WAN-1' to encl 10, and 'to YB Menteri Dalam Negeri…' in 'ARAH-2' to encl 9 enhanced my conclusion that the respective relevant documents must be addressed 'to' appropriate officer(s) who is or are entrusted to take 'in custody' the applicant in this Application; thus satisfies one of the 'procedural substantive' requirements for the valid exercise of a preventive detention as required by law. This is absent in the case of:

(1) 'ARAH-2' to encl 12 (the affidavit of the Chief Inspector Abdul Rahman bin Hj Abdul Hamid under s 3(3)(a) of the Ordinance); and

(2) 'MM-1' to encl 11 (the affidavit of DSP Mansor b Mohamed).

[20] Both 'ARAH-2' and 'MM-1' were *not* addressed *to* anyone at all. Without it, the question is, '*to whose custody should the applicant, Rashid bin Kulop Mohamad be placed?*'. Both the said documents only speak of the *need to detain further* for a period of more than (i) 24 hours (s 3(3)(a) of the Ordinance in respect of 'ARAH-2'); and (ii) 48 hours (s 3(3)(b), ibid, in respect of 'MM-1'). If those two documents

which speak clearly of the respective officers' right to detain the applicant as stated earlier are placed alongside with 'ZAZ-1' to encl 6, a glaring similarity as to the *form* can be seen as illustrated below *except* that, 'ZAZ-1' as pointed out above, is properly addressed '*to*' the appropriate '*detaining authority*' '*whose custody of the applicant was being properly placed*' but not in the respect of 'ARAH-2' and 'MM-1' aforesaid.

[21] In both 'ARAH-2' and 'MM-1' aforesaid, the following words can be found:

> *BAHAWA saya* C/Insp A Rahman Bin Hj A Hamid …*berpuas hati* berkenaan kes terhadap (the applicant)… dengan menjalankan kuasa-kuasa yang diberi kepada saya di bawah Seksyen 3(3)(a) (of the Ordinance), maka saya dengan ini *memberi kuasa* supaya (the applicant) dilanjutkan *tahanannya* selama 24 jam lagi... (Emphasis added).

in respect of 'ARAH-2' and 'C/Insp A Rahman ...' and 'Seksyen 3(3)(a)' were being substituted with '(ASP) MANSOR BIN MOHAMAD' and 'Seksyen 3(3)(b)...' respectively in 'MM-1'. The effect to that is to legalise the respective relevant detentions under the aforesaid sections. Words having similar effect of legalising detention under s 4(1) of the Ordinance as for 'ZAZ-1' are as follows:

> BAHAWASANYA saya (DATO' ZAINAL ABIDIN BIN ZIN, TIMBALAN MENTERI DALAM NEGERI, Malaysia) berpuas hati yang Perintah ini adalah perlu dibuat ke atas (the applicant)….
>
> Oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya di bawah Seksyen 4(1) ('of the Ordinance'), maka saya *mengarahkan* dengan Perintah ini *supaya* ('the applicant') *ditahan selama dua tahun*… (Emphasis added).

[22] The word 'mengarahkan' without doubt, *authorised* the person(s) addressed '*to*' thereto, *to* receive the applicant 'in his or their custody' under s 4(1) of the Ordinance similar to 'authorising' the person(s) to do the same within the permitted periods as provided by ss 3(3)(a) and (b) of the Ordinance. The glaring difference is that, as pointed above and at the risk of repetition, in respect of 'ZAZ-1' it was properly addressed to the 'receiving authority' but not in either 'ARAH-2' or 'MM-1'. Failure to do so is what I have termed as a '*failure to comply with one of the 'procedurally substantive' requirements*'. Such a 'substantive' failure, compelled me to conclude that the detentions under s 3(3)(a) and (b) of the Ordinance as unlawful. Consequential to that, it has the effect of vitiating the legality of a proper exercise of power by the Minister under s 4(1) of the Ordinance.

[23] On the premises above, and for the reasons elaborated above, I am left with no alternative but to issue the writ of *habeas corpus* as applied for accordingly; and so ordered.

Writ of habeas corpus issued.

Reported by AG Kalidas